

Khan (Migration) [2023] AATA 1890 (19 June 2023)

DECISION RECORD

DIVISION:	Migration & Refugee Division
APPLICANT:	Mr Muhammad Umar Shehzad Khan
REPRESENTATIVE:	Mr Mark Edward Northam (MARN: 1175508)
CASE NUMBER:	1826589
HOME AFFAIRS REFERENCE(S):	BCC2016/1724901
MEMBER:	Moira Brophy
DATE:	19 June 2023
PLACE OF DECISION:	Sydney
DECISION:	The Tribunal remits the application for a Partner (Temporary) (Class UK) visa, with the direction that the applicant meets the following criteria for a Subclass 820 (Partner) visa: • CI 820.211(2)(c) of Schedule 2 to the Regulations; and • CI 820.221 (4) of Schedule 2 to the Regulations. •

Statement made on 19 June 2023 at 3:41pm

CATCHWORDS

MIGRATION – Partner (Temporary) (Class UK) visa – Subclass 820 (Partner) – genuine and continuing relationship – sponsorship limitation requirement – compelling circumstances – sponsor's complex medical history – more than five years have passed at the time of decision – joint financial decision-making – shared household responsibilities – joint social activities and travel – decision under review remitted

LEGISLATION

Migration Act 1958, ss 5, 65

Migration Regulations 1994, Schedule 2, cls 820.211, 820.221; rr 1.03, 1.15, 1.20

CASES

Babicci v MIMIA [2004] FCA 1645

Babicci v MIMIA [2005] FCAFC 77

He v MIBP [2017] FCAFC 206

Paduano v Minister for Immigration & Multicultural and Ethnic Affairs [2005] FCA 211

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

1. This is an application for review of a decision made by a delegate of the Minister for Home Affairs on 24 August 2018 to refuse to grant the applicant a Partner (Temporary) (Class UK) visa under s 65 of the *Migration Act 1958* (Cth) (the Act).
2. The applicant applied for the visa on 12 May 2016 on the basis of his relationship with his sponsor. At that time, Class UK contained only one subclass: Subclass 820 (Partner). The criteria for the grant of this visa are set out in Part 820 of Schedule 2 to the *Migration Regulations 1994* (Cth) (the Regulations). The primary criteria must be satisfied by at least one applicant. Other members of the family unit, if any, who are applicants for the visa need satisfy only the secondary criteria.
3. The delegate refused to grant the visa on the basis that the applicant did not satisfy cl 820.211 because the delegate was not satisfied that the applicant was in a genuine and continuing relationship with his sponsor and the delegate was also not satisfied there were compelling circumstances affecting the sponsor to warrant a waiver of the requirements of regulation 1.20J.
4. The applicant, Mr Muhamad Umar Shehzad Khan appeared before the Tribunal on 17 May 2023 to give evidence and present arguments. The Tribunal also received oral evidence from the sponsor, Ms Puna Raea.
5. The applicant was represented in relation to the review. The representative attended the Tribunal hearing.
6. For the following reasons, the Tribunal has concluded that the **matter should be remitted for reconsideration**.

7. Background

8. The applicant, Mr Muhamad Umar Shehzad Khan is a 38-year-old male currently residing in Sydney. He has declared no previous relationships. He arrived in Australia on 17 January 2012 on a Student visa. His father is deceased, and his mother and five brothers reside in Pakistan.
9. The sponsor is a 49-year-old female living in Sydney. She was previously married to Mr Mohammad Hussain in the period from 13 August 2000 to 16 January 2006. She was then married to Nihal Pannu in the period from 27 July 2007 to 2 April 2015. The sponsor sponsored her two previous partners to Australia. She was born in Raratonga, Cook Islands and came to Australia on 13 December 1994. Her mother is deceased and her father and two sisters reside in Australia.
10. At the time of application, the parties stated they met on 27 September 2014 at a picnic lunch with friends in Brighton. They commenced dating and they committed to a shared life to the exclusion of all others on 10 May 2015. They were married on 3 May 2016.

CONSIDERATION OF CLAIMS AND EVIDENCE

Tribunal proceedings

11. In making its findings, the Tribunal has considered documents contained in the Department and Tribunal files and oral evidence provided by the applicant and sponsor at the hearing.

12. The parties gave coherent oral evidence about the circumstances in which they met, the development of their relationship and their current living arrangements.
13. While the Tribunal had concerns as to the part a visa played in the relationship, the age difference of the parties, and the knowledge of the respective families as to the relationship, the parties did not resile from answering the questions put to them on these matters. They were forthright and consistent in their answers and the initial concerns of the Tribunal were largely assuaged by their oral evidence.

Whether the parties are in a spouse or de facto relationship

14. Clauses 820.211(2)(a) and 820.221 require that at the time the visa application was made, and at the time of this decision, the applicant is the spouse or de facto partner of an Australian citizen or Australian permanent resident or an eligible New Zealand citizen. In the present case the applicant claims to be the spouse of the sponsor who is an Australian citizen.
15. 'Spouse' is defined in s 5F of the Act and provides that a person is the spouse of another where the two persons are in a married relationship. Persons in a married relationship must be married to each other under a marriage that is valid for the purposes of the Act, there must be a mutual commitment to a shared life as a married couple to the exclusion of all others, the relationship must be genuine and continuing, and the couple must live together, or not live separately and apart on a permanent basis: s 5F(2)(a)-(d). In forming an opinion about these matters, regard must be had to all of the circumstances of the relationship. This includes evidence of the financial and social aspects of the relationship and the nature of the parties' household and their commitment to each other as set out in reg 1.15A(3), which is extracted in the attachment to this decision. Each of the specific matters contained in reg 1.15A(3) are effectively questions which must be answered: *He v MIBP* [2017] FCAFC 206.

Are the parties validly married?

16. If the parties are validly married, they may meet the requirements of a spousal relationship, but not a de facto relationship. There is nothing in the information before the Tribunal to cast doubt on the validity of the parties' marriage on 3 May 2016 and it was not disputed by the delegate. Consequently, in the absence of any evidence to the contrary, the Tribunal finds the parties were married to each other under a marriage that is valid for the purposes of the Act as required by s 5F(2)(a).

Are the other requirements for a spouse relationship met?

17. Financial

18. The Tribunal considered the financial aspects of the relationship – including joint ownership of assets; joint liabilities; the extent of pooling of financial resources; any legal obligations owed to the other party; and any sharing of day-to-day household expenses.
19. The parties reside together in a rented unit. The sponsor has lived there since 2013 and the applicant moved in March 2016. It is a two-bedroom property, and they pay rent of \$440 per week which is direct debited from the sponsor's bank account.
20. The applicant works as a driver. He drives a child to school each morning from Baulkham Hills to St Ives and he then contracts to Royal Limousines driving mainly between the Northern Beaches and Sydney Airport. Between the two lines of work, he is paid around \$2000 each week which is deposited into his personal account. The sponsor is employed full

time in administration for a company she has worked for for past 15 years. She is paid \$102,000 per annum by monthly instalments into her personal account.

21. The parties gave consistent evidence that the joint account was their default account and things were mainly paid out of their personal accounts. They use the joint account for transferring money and for travel. The sponsor has had debts arising out of her previous marriage and these impacted on her credit rating. She has managed to clear those debts by entering a deed of arrangement. The applicant was cognisant of all the details of this arrangement.
22. A perusal of the bank statements provided is indicative of each party meeting day-to-day expenses from their personal accounts.
23. The parties do not have any joint assets. However, the Tribunal accepts the evidence that the sponsor purchased a car last year. The applicant taught her to drive, and she got her licence. This enabled her to drive herself to work where previously the applicant had been driving her. They both contributed to the purchase price of the car and the applicant pays the running costs.
24. They presently do not have any joint real estate. They presently do not have any savings. They do not have any joint liabilities.
25. The Tribunal carefully considered the evidence as to whether the financial arrangements were consistent with the parties being in a genuine and continuing relationship. While they were cognisant of the details of each other's finances, there was no obvious intermingling of resources. Neither party was able to access the personal account of the other. The Tribunal appreciates that the parties, especially the applicant, experienced significant financial difficulties during the COVID-19 pandemic and has considered this period of difficulty could impact on their financial decision-making.
26. Overall, the Tribunal finds the financial aspects of the parties' relationship are consistent with the parties being in a genuine spousal relationship both at the time of application and at the time of decision.

27. *Nature of the household*

28. In considering the nature of the household, the Tribunal has considered the evidence including any joint responsibility for care and support of children; the parties' living arrangements; and any sharing of housework.
29. The Tribunal accepts the parties have lived together on a continuing basis since 2016.
30. The parties provided consistent and convincing evidence regarding the arrangements for their household. The sponsor is responsible for most of the cooking, and they share the household chores and the washing. They both do the grocery shopping together.
31. The evidence of the establishment of a joint household provides significant weight in support of the finding of a genuine and continuing relationship.
32. The Tribunal finds the nature of the household is consistent with the parties being in a genuine spousal relationship at the time of application and at the time of decision.

33. *Social aspects of the relationship*

34. In considering the social aspects of the relationship, the Tribunal has considered whether the parties represent themselves to other people as being married to each other; the opinion of

friends and acquaintances about the nature of the relationship; and any basis on which the persons plan and undertake joint social activities.

35. The parties provided a number of statutory declarations from family and friends which attested to the genuineness of the relationship. The information in these declarations is consistent with the other evidence before the Tribunal.
36. The parties provided documentary evidence to support their oral evidence at the hearing that they have enjoyed trips together to Queenstown, Tasmania, Canberra and to the Snow. They frequently take day trips to places such as the Blue Mountains, Orange, the South Coast, and the Central Coast.
37. The applicant was involved in activities with the family of the sponsor and was cognisant of the difficulties in the sponsor's relationships with her father and siblings. The applicant was supportive of the sponsor in the challenges the family was presently facing.
38. On the basis of the oral evidence of the parties and the evidence provided by way of photographs, the Tribunal finds that the relationship between the applicant and his sponsor is recognised and supported by their family and friends. The Tribunal is satisfied that the parties represent themselves as being married to one another to their family, friends, and the wider community.
39. The Tribunal finds the social aspects of the relationship are consistent with the parties being in a genuine spousal relationship at the time of application and at the time of decision.

40. Nature of the persons' commitment to each other

41. In considering the nature of the persons' commitment to each other, the Tribunal considered the duration of the relationship; the length of time the parties have lived together; the degree of companionship and emotional support they draw from each other; and whether they see the relationship as long-term.
42. The Tribunal finds that the applicant and his sponsor have been in a committed relationship since they met in 2014. They have lived together continuously since 2016.
43. The parties were familiar with the details of each other's family and with each other's daily work schedules.
44. The parties demonstrated a detailed knowledge of each other's lives and daily routines. Their evidence about their future was consistent. The Tribunal is satisfied that the applicant and his partner are committed to being in a long-term relationship. The degree of companionship and emotional support the parties clearly draw from one another provides significant weight in support of the finding that the parties are in a genuine and continuing relationship.
45. On the basis of the above, the Tribunal **is** satisfied that the requirements of s 5F(2) are met **at the time the visa application was made and the time of this decision.**
46. The Tribunal next considered whether there were compelling circumstances affecting the sponsor to warrant a waiver of the requirements of reg 1.20J.

Is the applicant sponsored?

47. Clause 820.211 requires at the time of application; the applicant meets one of several alternative sub criteria. These include cl 820.211(2)(c) which requires that the applicant was, at the time of application, sponsored by the sponsor, where such person has turned 18; or

where they have not, by the sponsor's parent or guardian who has turned 18 and is either an Australian citizen, permanent resident, or eligible New Zealand citizen (as defined in reg 1.03 of the Regulations).

48. At the time of decision, the applicant must continue to be sponsored by the sponsor, and the sponsorship must have been approved by the Minister and be still in force. Exceptions apply in certain circumstances where the sponsor has died, or family violence has occurred, or a child is involved. For visa applications made on or after 18 November 2016, the sponsor must also have consented for the Department to disclose to each applicant any conviction for a relevant offence, unless the conviction has been quashed or otherwise nullified, or where the sponsor has been pardoned with the effect that he or she is taken never to have been convicted of the offence: cl 820.221.
49. Approval of sponsorship is subject to limitations contained in reg 1.20J of the Regulations which sets a limit on the number of people that a person can sponsor in a lifetime and a minimum time that must lapse between each sponsorship, and in reg 1.20KA which sets a limit on the period before which certain Parent visa holders can sponsor another person for a Partner visa. There are further limits imposed by reg 1.20KB in relation to sponsors charged with, or convicted of, certain offences where the visa application was made on or after 27 March 2010, and reg 1.20KC for sponsors convicted of a relevant offence who have a significant criminal record in relation to the relevant offence where the visa application was made on or after 18 November 2016.
50. The Tribunal has considered the application form lodged 12 May 2016, and the sponsorship details in the form. The Tribunal has considered the sponsor's Australian passport, issued in 2006. The Tribunal has considered the date of birth recorded in the sponsor's Australian passport, and her medical records. The Tribunal has considered the evidence at the hearing. The Tribunal is satisfied the sponsor is the sponsor of the applicant, at the time of application, and continues to be the applicant's sponsor at the time of decision. The Tribunal is satisfied the sponsor is an Australian citizen. The Tribunal is satisfied the sponsor is well over the age of 18 years, having been born in 1973.
51. The Tribunal has considered the identity documents provided by the applicant, including the applicant's Pakistani passport. The Tribunal satisfied that the applicant is over the age of 18 years. The Tribunal has considered the sponsorship form lodged online by the sponsor on 12 May 2016.
52. The Tribunal is satisfied that the applicant meets the sponsorship requirements of cl 820.211(2)(c) at the time of application.
53. In the Department's decision record dated 24 August 2018, a copy of which was provided to the Tribunal by the applicant, it is recorded that the sponsor had previously sponsored two persons who had been granted relevant visas as either her spouse, partner or prospective spouse or partner, and for this reason the limitations on further sponsorships under reg 1.20J apply in this review.
54. The applicant and his representative stated in the hearing that it was conceded the sponsor had previously sponsored two partners who had been granted visas, and that the limitation provisions of reg 1.20J were engaged. These requirements apply unless the Minister, or the Tribunal on review, is satisfied there are compelling circumstances affecting the sponsor: reg 1.20J(2).
55. The expression 'compelling circumstances' is not defined in the legislation. The Tribunal must consider whether the circumstances are such that they evoke interest or attention in a powerfully irresistible way: *Babici v MIMA* [2004] FCA 1645 or are 'so powerful that they lead the [Tribunal] to make a positive finding that the [provision] should be waived': *Babici v*

MIMIA [2005] FCAFC 77. In the case of *Paduano v Minister for Immigration & Multicultural and Ethnic Affairs* [2005] FCA 211, the Federal Court held that the ordinary meaning of 'compelling' is 'forceful' and that forceful reasons may involve physical, legal, or moral necessity, or may, by reason of their forcefulness, be convincing.

56. The applicant provided the Tribunal with extensive submissions and attachments in support of the claim that compelling circumstances exist affecting the sponsor.
57. The Tribunal accepts the evidence that has been provided in the form of extensive written evidence of the relationship, and the oral evidence from the applicant and the sponsor that the parties have been in a committed relationship since their marriage.
58. The Tribunal has assessed the evidence before it that the sponsor has a complex medical history and that this impacts on her ability to undertake certain tasks. The Tribunal accepts that overall, the quality of medical services in Pakistan is lower than Australia and this would be to the detriment of the sponsor. The Tribunal also accepts the sponsor has worked hard to establish her career in administration and an interruption to this career would be both personally and financially to her detriment.
59. The Tribunal has considered the evidence of the applicant and the sponsor as to the current difficulties of the sponsor's family. The Tribunal accepts that the sponsor is emotionally and psychologically vulnerable at the present time and is dependent upon the applicant for his support in dealing with the problems her family members are facing. The Tribunal accepts the evidence that the relationship with the applicant has assisted the sponsor in dealing with these issues. On the evidence before the Tribunal, these problems are ongoing and there is a real possibility of the sponsor having to assume the full-time care of her elderly father. The Tribunal accepts the evidence of the sponsor that if the sponsorship was not approved and the application for the visa were rejected, it would affect her because she depends on the applicant.
60. The Tribunal is satisfied that the applicant and the sponsor are in a long-standing relationship. The Tribunal is further satisfied that there are compelling circumstances affecting the sponsor, namely her health, her career, and her family issues, that amount to reasons for approving the sponsorship of the application for the visa.
61. Therefore, although the Tribunal is satisfied that the reg 1.20J(1)(a)(i) limitations apply in this case, it is also satisfied pursuant to reg 1.20J(2) the sponsorship of the application for the visa should be approved because it is satisfied that there are compelling circumstances affecting the sponsor.
62. The Tribunal is satisfied that at the time of decision for the purposes of cl 820.221(4), the sponsorship mentioned in cl 820.211(2)(c) is approved by the Tribunal. Therefore, the applicant meets the time of decision sponsorship requirements of cl 820.221(4).
63. For the above reasons, and on the evidence before the Tribunal, the applicant meets the requirements of cl 820.211(2)(c) and cl 820.221(4).

DECISION

64. The Tribunal remits the application for a Partner (Temporary) (Class UK) visa, with the direction that the applicant meets the following criteria for a Subclass 820 (Partner) visa:
 - Cl 820.211(2)(c) of Schedule 2 to the Regulations; and
 - Cl 820.221(4) of Schedule 2 to the Regulations.

Moira Brophy
Member

ATTACHMENT - Extract from Migration Regulations 1994

1.15A Spouse

(1) For subsection 5F (3) of the Act, this regulation sets out arrangements for the purpose of determining whether 1 or more of the conditions in paragraphs 5F (2) (a), (b), (c) and (d) of the Act exist.

- (2) If the Minister is considering an application for:
- (a) a Partner (Migrant) (Class BC) visa; or
 - (b) a Partner (Provisional) (Class UF) visa; or
 - (c) a Partner (Residence) (Class BS) visa; or
 - (d) a Partner (Temporary) (Class UK) visa;

the Minister must consider all of the circumstances of the relationship, including the matters set out in subregulation (3).

- (3) The matters for subregulation (2) are:
- (a) the financial aspects of the relationship, including:
 - (i) any joint ownership of real estate or other major assets; and
 - (ii) any joint liabilities; and
 - (iii) the extent of any pooling of financial resources, especially in relation to major financial commitments; and
 - (iv) whether one person in the relationship owes any legal obligation in respect of the other; and
 - (v) the basis of any sharing of day to day household expenses; and
 - (b) the nature of the household, including:
 - (i) any joint responsibility for the care and support of children; and
 - (ii) the living arrangements of the persons; and
 - (iii) any sharing of the responsibility for housework; and
 - (c) the social aspects of the relationship, including:
 - (i) whether the persons represent themselves to other people as being married to each other; and
 - (ii) the opinion of the persons' friends and acquaintances about the nature of the relationship; and
 - (iii) any basis on which the persons plan and undertake joint social activities; and
 - (d) the nature of the persons' commitment to each other, including:
 - (i) the duration of the relationship; and
 - (ii) the length of time during which the persons have lived together; and
 - (iii) the degree of companionship and emotional support that the persons draw from each other; and
 - (iv) whether the persons see the relationship as a long term one.
- (4) If the Minister is considering an application for a visa of a class other than a class mentioned in subregulation (2), the Minister may consider any of the circumstances mentioned in subregulation (3).